

Before the
Federal Communications Commission
Washington, D.C. 20554

SEP 23 2005
SEP 22 16 45
FCC 05M-44
04710

In the Matter of)	EB Docket No. 04-381
)	
Florida Cable Telecommunications)	
Association, Inc.; Comcast Cablevision of)	
Panama City, Inc.; Mediacom Southeast,)	
L.L.C.; and Cox Communications Gulf,)	
L.L.C.,)	
)	
Complainants,)	
)	
v.)	
)	
Gulf Power Company,)	
)	
Respondent.)	

SECOND DISCOVERY ORDER

Issued: September 21, 2005

Released: September 22, 2005

Background

On July 11, 2005, Florida Cable Telecommunications Association, *et. al* ("Complainants") filed a Motion to Compel Gulf Power Company's ("Gulf Power") Response to Interrogatories and Requests for Production of Documents ("First Motion"). Complainants' First Motion and Gulf Power's Response were considered and rulings were made in *Discovery Order* FCC 05M-38, released August 5, 2005. Pursuant to the *Discovery Order*, on August 10, 2005, Complainants served Second Set of Request for Production of Documents. On August 26, 2005, Gulf Power filed Response to Second Request for Documents and Supplemental Responses to Interrogatories.

Complainants' instant Motion to Compel ("Second Motion") was filed on August 31, 2005. Gulf Power filed Response to Complainants' Second Motion to Compel ("Response") on September 9, 2005. Complainants filed Motion for Leave to File Reply on September 9, 2005, which was unopposed.

Gulf Power's burden of proof remains:

[Gulf Power] must show *with regard to each pole* that (1) the pole is at full capacity and (2) either (a) another buyer of the space is waiting in the wings or (b) the power company is able to put the space to a higher-valued use with its own operations.

Complainants now request compulsory answers to selective document requests and interrogatories.

Standards for Document/Interrogatory Discovery

The Federal Rules of Civil Procedure (FRCP) are relevant to rulings on discovery in FCC hearings. *See Discovery Procedures*, 11 FCC 2d 185, *et. seq.* (1968). The case of *Allianz Insurance Co. v. Surface Specialties, Inc.*, 2005 WL 44534 (D. Kan.) has been consulted, which recognizes a serious duty of responsiveness to outstanding document and interrogatory discovery under the FRCP.

Rule 33 (d) of the FRCP provides a party responding to interrogatories the option of producing business documents in lieu of providing answers. However, in utilizing that option, the answering party must "specify the records from which the answer may be derived or ascertained," which records must be made available "to examine, audit or inspect such records." Any document "specification shall be in sufficient detail to permit the interrogating party to locate and identify --- the records from which the answer may be ascertained."

Rule 34 provides that a party producing documents "shall produce them as they are kept in the usual course of business" or "shall organize and label them to correspond with the categories in the request." When documents are not produced "as they are kept in the usual course of business," then the producing party "is required to identify the particular documents or to organize and label them to correspond to the request."

Importantly, *Notes* to the FRCP instruct on procedures for producing documents under Rule 34 that are essentially the same as Rule 33. *See Note* to Rule 34, 1970 Amendment Subdivision (b). So when a party responds to interrogatory or document discovery by producing responsive business documents, the production of documents "may not impose on an interrogatory party a mass of records as to which research is feasible only for one familiar with the records." (Emphasis added.) *See Note* to Rule 33, 1970 Amendment Subdivision (c).

DOCUMENTS

Complainant's Second Set of Document Requests

Request No. 1.

Produce and specify by Bates number, all documents referring to any instance, from 1998 through the present, in which Gulf Power was unable to accommodate additional attachments, either by third parties or by Gulf Power itself, on poles already containing Complainants' attachments.

Gulf Power is required to identify the particular documents that are responsive to the request, or Gulf Power must organize and label responsive documents to correspond to each request. It not sufficient to merely state that the documents were made available for inspection and copying during the May 27-28 document review. And in the event that Gulf Power's discovery documents are not Bates stamped, there must be some other identifying numbering system utilized by Gulf Power in order to make discovery intelligible. Gulf Power has the continuing duty in discovery to make its business records intelligible as evidence. Gulf Power is directed to produce the documents responsive to Request No. 1 in a format that accords with the FRCP.

Request No. 2.

Produce and specify by Bates number, all documents referring to the actual costs that Gulf Power has incurred annually because of Complainants' attachments (including per – pole costs and aggregate costs), as reflected in its accounting books or records of expenses, from 1998 to the present.

Gulf Power is required to identify documents that will show the actual costs of Gulf Power with respect to Complainants' attachments. It is not sufficient to respond that the documents that would reflect costs incurred as a result of Complainants' attachments are the make ready orders provided during the May 27 – 28 document review. *See* discussion of FRCP *Notes* above. Gulf Power is directed to produce the documents responsive to Request No. 2 in a format that accords with the FPCP.

Request Nos. 4, 5, 6 and 7.

Produce and specify by Bates number, all documents referring to Gulf Power poles (a) that have been changed out at the request of Complainants; (b) that have been changed out of the request of other cable TV attachers; (c) that refer to Complainants make-ready work other than change outs; (d) that refer to other cable TV attachers make-ready work other than change-outs.

These four requests ask for documents pertaining to "change-outs and other "make-ready" work that was done at the request of Complainants, and at the request of CATV attachers other than Complainants. All such cost-related documents from 1998 to the present that concern CATV attachers on Gulf Power poles are relevant to the damages issue. It is not sufficient to respond that documents relating to change-outs and make-ready were made available for inspection and copying at the May 27-28 document review.

See *Allianz, supra.* and discussion of FRCP *Notes* above. Gulf Power is directed to produce the documents responsive to Request Nos. 4, 5, 6 and 7 in formats that accord with the FRCP.

Request No. 8.

Produce and specify by Bates number, all documents referring to Gulf Power's *upgrades, modernization, strengthening or replacements* of poles containing Complainants' attachments from 1998, including documents referring to money Gulf Power obtained to pay for such upgrades, modernizations, strengthening or replacements.

Gulf Power objects to producing this documentary information and argues that such evidence is irrelevant to its claim for damages. Complainants argue convincingly that evidence of "upgrades, modernization, strengthening or replacements of poles" is relevant to the issue of Gulf Power's pole capacity. For example, such evidence could relate to present and future capacity for current CATV cable attachers and future CATV cable attachers. Gulf Power is directed to produce the documents responsive to Request No. 8 in a format that accords with the FRCP.

Request No. 12.

Produce and specify by Bates number, all documents which Gulf Power relied on or relies upon in making its condition, in its Declaration of Evidence that there is an "unregulated market for pole space," to the extent that contention applies to CATV attachments.

Gulf Power admits that there are not any CATV attachers paying an unregulated rate. However, Gulf Power does "contend [that] an unregulated market for the [pole] space exists." Gulf Power also contends that it has produced documents which are relevant and probative of such an "unregulated market". Gulf Power now must identify those documents by Bates number or other specific document identifier. See discussion of FRCP and *Notes, above.*

Request No. 14.

Produce and specify by Bates number, all documents referring to sources --- from which Gulf Power has obtained new poles, from 1998 to the present, in order to change-out poles containing Complainants' attachments.

This is a request for document information about sources of poles from Gulf Power's inventory, joint-agreement inventories, and/or other suppliers. Gulf Power objects on grounds of relevancy. It appears that information on the source(s) of poles that are available to Gulf Power is relevant. If there is evidence of an inordinately tight supply of poles (present and/or future), that condition might inflate the rent paid by CATV cable attachers. Since poles relate to an element of cost, Gulf Power's objection to Request No. 12 is denied because pole availability could expand potential capacity and thereby effect "full capacity." Complainants and/or Gulf Power may seek to introduce pole sourcing at the hearing as proof of "capacity" or potential "capacity" as evidenced by pole availability. Gulf Power is directed to produce the documents responsive to Request No. 14 in a format that accords with the FRCP.

Request No. 15.

Produce and specify by Bates number, all documents, including maps, diagrams, or schematics, which existed prior to Gulf Power's retention of its consultant Osmose in February 2005, that depict the specific Gulf Power poles containing Complainants' attachments that Gulf Power contends were or have been at "full capacity."

Complainants are entitled to such documentary evidence which is properly identified under FRCP 34. Here it is best to identify "maps, diagrams or schematics" that depict poles holding Complainants' CATV attachments, regardless of "full capacity." Then, identify those poles that Gulf Power contends are at "full capacity". That can be done by color scheme or some such method of depicting poles holding Complainants' CATV cable that are alleged to be at "full capacity." Or utilizing a pre-existing schematic universe of poles, Gulf Power could circle the poles that it contends are at "full capacity." This request should be capable of being answered without undue burden.

It is not sufficient for Gulf Power to merely respond that such documents have already been provided at the May 27 – 28 review. Gulf Power does admit that "these documents were among those copied for Complainants." That being the case, those documents are readily identifiable by Gulf Power since they are Gulf Power's internal documents. Gulf Power has the advantage of familiarity with its pole inventory records, plus the only knowledge as to which poles it believes are maintained at "full capacity." Therefore, Gulf Power must identify such poles that it now believes to be of "full capacity." Gulf Power is also directed to produce the documents responsive to Request No. 15 in a format that accords with the FRCP.

Request No. 16.

Produce all Gulf Power documents, involving cost records or other accounting data, that reflect payment to Gulf Power by a cable television attacher other than Complainants of an annual pole rental rate higher than that paid by Complainants.

In its objection to Request No. 12, Gulf Power has represented that it "does not contend that there are any CATV attachers paying an regulated rate." In that event, there should be no responsive documents to Request No. 16, and Gulf Power's objection is sustained.¹

INTERROGATORIES

Gulf Power's Supplemental Responses to Interrogatories

Complainants represent that by virtue of rulings in the *Discovery Order*, Gulf Power has provided sufficient supplemental responses to Interrogatories 11, 12, 16, 17, 24, 36 and 45. Thus, there has been some progress made. However, Complainants seek further information for Gulf Power's Supplemental Answers to Interrogatories 8, 20, 25, 34, 35 and 46. Gulf Power has a duty to reply "with the candor and specificity that the rules of discovery require." *Hendlein Technologies*, 47 F.3d at 104-105.

Interrogatory No. 8

Gulf Power must identify the number of Complainants' CATV cable attachments on Gulf Power's poles, and provide information on when such attachments were connected, where located, and amounts of related compensation received by Gulf Power.² Gulf Power argues that responsive documents have been produced (citing eight examples), and Gulf Power assumes that Complainants seek information about "compensation for make-ready (rather than annual rents)." Gulf Power further answers

¹ It is noted that in its original response to Request No. 16, Gulf Power stated that it had produced "a number of CATV attachment agreements reflecting payment to Gulf Power in excess of the rents paid by complainants." Gulf Power has withdrawn this representation as an inaccuracy.

² See *Discovery Order* at 5-6, recognizing the ongoing Osmose survey, and holding that "Gulf Power should have business records disclosing the identity of current pole attachers [and] should have internal documents identifying attachers paying the FCC Formula."

that "the only place Gulf Power tracks make-ready payments on a per pole basis is within the make-ready work orders themselves," and those documents were produced during the May 27-28 review.

Gulf Power again refers to documents produced for review on May 27-28. But where business documents are used to respond to interrogatories, Gulf Power "must specifically identify the documents from which the reporting party may derive and answer." *Cf. Herdlein Technologies, Inc. v. Century Contractors, Inc.*, 147 F.D.R. 103, 105-106 (W.D. No. Carolina 1993). Gulf Power "has the duty to respond fully and completely to each interrogatory." *Id.* Therefore, the documents must be identified that respond to the question. *See Discover Order* at 5-6, holding that "Gulf Power must revisit Interrogatory No. 8 and its answer to provide information that it currently possess[es] about users, make-ready costs, and per pole compensation, as that information is requested by this Interrogatory.

Interrogatory No. 20.

This interrogatory seeks information that relates to change-outs at the request of Complainants. Gulf Power may not merely refer generally to "make-ready documents produced." The "make-ready" documents must be related to specific poles that are identified/indicated as being at "full capacity." Gulf Power also must respond to questions that ask the number of poles changed-out to accommodate Complainants; locations of change-outs; reasons for each change-out; and instances alleged by Gulf Power to not have been reimbursed for related costs.

Interrogatory No. 25.

Gulf Power was asked to explain steps and procedures involved in changing-out a pole. Gulf Power was ordered to answer Interrogatory No. 25 under the *Discovery Order*. Gulf Power has still not given a full response. Gulf Power objects to providing further narrative and refers Complainants to deposition testimony scheduled for September 14-16, 2005. Complainants are entitled to a full and complete answer to Interrogatory No. 25. *See Discover Order* at 11 (Gulf Power must furnish the information requested regarding steps and procedures for completing a "change-out" for a CATV attacher.)

Interrogatory No. 34.

Gulf Power was asked whether it informs prospective and existing attachers when pole space is reserved for future use for its own "core electricity operation," and to identify all such reservations and notifications. Gulf Power has not provided instances of having provided reservation notices. Gulf Power must identify instances in which it has advised an attacher, particularly Complainants, that it has demonstrated a need for reserving future space on a pole or poles. *See Discover Order* at 13 (Gulf Power has provided partial information which it must supplement, at a risk of being barred from

introducing such evidence at the hearing). Gulf Power must answer Interrogatory No. 34 in a format that accords with the FRCP.

Interrogatory No. 35.

Gulf Power was asked whether it has required use of reserved pole space that is occupied by Complainants and to identify any such instances. *See Discovery Order* at 13 (failure to answer an apparent oversight). Gulf Power responded in a supplement that it “does not track its future space needs on a pole by pole basis.” The latest response is concise, responsive to the question, and therefore legally sufficient. Conversely, in view of this categorical denial, Gulf Power will be precluded from offering any such evidence at the hearing. Gulf Power need not respond further to Interrogatory No. 35.

Interrogatory No. 46.

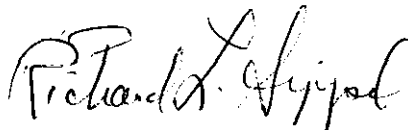
Gulf Power was asked to identify pole attachment rental rate paid by Gulf Power to other joint user pole owners, including space leased and methodologies employed for calculating rental rates. *See Discovery Order* at 16 (Gulf Power ordered to provide methodology formulas used to calculate ILEC rate information). Gulf Power has provided charts but has not provided information on rate calculations. Gulf Power has referred Complainants to documents which it considers sufficiently responsive. Gulf Power must either provide a full and complete narrative response, or identify by document and page where responsive methodology/formula are to be found. *See Allianz Insurance, supra*, and *Hendlein Technologies*, 147 F.R.D. at 103-105.

Order of Compliance

Gulf Power must comply fully with these ruling by **September 30, 2005**.

SO ORDERED

FEDERAL COMMUNICATIONS COMMISSION³

A handwritten signature in black ink, appearing to read "Richard L. Sippel", is written over a horizontal line.

Richard L. Sippel
Chief Administrative Law Judge

³ Courtesy copies of this *Order* were transmitted to counsel for each of the parties by e-mail on the date of issuance.